STATE OF MICHIGAN

COURT OF APPEALS

DIANE A. LEWIS, Personal Representative of the Estate of ANTHONY LEWIS,

Plaintiff-Appellee,

v

LEWERENZ HEALTH & WELLNESS CENTER FOR FAMILY & SPORTS, P.C., a/k/a LEWERENZ MEDICAL CENTER, and FREDERICK LEWERENZ, D.O.,

Defendants,

and

OAKLAND MEDICAL GROUP, P.C., a/k/a LEWERENZ MEDICAL CENTER, and JAMES S. LEWERENZ, D.O.,

Defendants-Appellants.

UNPUBLISHED
September 4, 2008

No. 277179
Macomb Circuit Court
LC No. 06-002615-NH

Before: Schuette, P.J., Zahra and Owens, JJ.

PER CURIAM.

Defendants Oakland Medical Group, P.C., a/k/a Lewerenz Medical Center, and James S. Lewerenz, D.O.,[1] were granted leave to appeal the trial court's order denying their motion for summary disposition concerning plaintiff's failure to file an affidavit of merit with her amended complaint. We reverse and remand. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff Diane A. Lewis, as personal representative of the estate of her deceased husband, Anthony Lewis, filed her complaint June 16, 2006. She claimed that medical malpractice occurred when decedent sought medical treatment on February 20, 2004 concerning abdominal pain and died four days later from peritonitis due to acute appendicitis.

[1] Further references to "defendants" in this report are to Oakland Medical Group and Dr. James Lewerenz only.

Plaintiff's initial complaint listed only Lewerenz Medical Center, P.C., and Frederick Lewerenz, D.O., as defendants. The initially named defendants are not parties to this appeal.

Plaintiff's amended notice of intent to file claim was dated July 6, 2006. That amended notice identified and was sent to defendants.

On July 19, 2006, Dr. Frederick Lewerenz filed a notice of non-party at fault identifying his son, Dr. James Lewerenz, as decedent's treating physician. On October 6, 2006, plaintiff filed an amended complaint, adding defendants to the claim. Plaintiff did not file an affidavit of merit with that amended complaint.

The trial court denied defendants' motion for summary disposition, ruling that plaintiff's single affidavit of merit did not require dismissal of defendants.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Summary disposition is permitted under MCR 2.116(C)(7) when "[t]he claim is barred because of … statute of limitations … or other disposition of the claim before commencement of the action." MCR 2.116(C)(7).

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim. *Maiden, supra*, 119. Summary disposition is permitted under MCR 2.116(C)(8) only when the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.*

The statute of limitations for bringing a malpractice claim is two years. MCL 600.5805(6). Before filing a complaint alleging medical malpractice, a plaintiff must give the health professional or health facility written notice of the intent to file a claim and then wait the applicable waiting period. MCL 600.2912b.

When initiating an action alleging medical malpractice a plaintiff must also file and serve an affidavit of merit along with the complaint. MCL 600.2912d; *Scarsella v Pollak*, 461 Mich 547, 549; 607 NW2d 711 (2000). Merely tendering a complaint without the required affidavit of merit does not commence the lawsuit, and does not toll the period of limitation. *Scarsella, supra*, 549-550. The proper remedy for a complaint that is filed without an affidavit of merit is dismissal without prejudice so the plaintiff can refile properly at a later date, provided plaintiff can still comply with the applicable statute of limitations. *Id.*, 551-552.

When an affidavit of merit is filed and served with the complaint, it is presumed to be valid. *Kirkaldy v Rim*, 478 Mich 581, 586; 734 NW2d 201 (2007). That presumption can be challenged in later proceedings, but the period of limitations is still tolled when a complaint and affidavit of merit are filed and served on defendant. *Id.*, 581. Therefore, even if the affidavit of merit is defective it will toll the period of limitations if it is filed and served with the complaint. *Glisson v Gerrity*, 480 Mich 883; 738 NW2d 237 (2007). "Only a successful challenge {to the affidavit of merit} will cause the affidavit to lose its presumption of validity and cause the period of limitations to resume running." *Kirkaldy, supra*, 586. When an affidavit of merit is successfully challenged, the proper remedy is dismissal without prejudice, thereby allowing the plaintiff to refile in whatever time remains in the statute of limitations. *Id.*

An affidavit of merit is a certification that an expert has reviewed the applicable notice of intent to file claim and related medical records and found that, among other things, the health professional or health facility receiving the notice of intent breached the applicable standard of practice or care. MCL 600.2912d. In this case, the affidavit of merit that was filed on June 16, 2006 could not have allowed the affiant to review the notice of intent for defendants that was dated July 6, 2006, and therefore the affidavit of merit could not apply to defendants.

As noted earlier, the remedy is the same whether an affidavit of merit is not filed at all or whether it is filed and later successfully challenged. That remedy is dismissal without prejudice allowing plaintiff to refile within the applicable statute of limitations. *Kirkaldy, supra,* 586; *Scarsella, supra,* 551-552. Therefore, the issue in this case is what time remains, if any, in the statute of limitations relating to plaintiff's case against defendants.

After providing the proper notice of intent to file claim, the basic waiting period required before starting a malpractice action is 182 days. MCL 600.2912b(1). The statute of limitations, however, is tolled at the time a notice of intent to file claim is given. MCL 600.5852.

In this case, the initial notice of intent was given to Dr. Frederick Lewerenz on December 22, 2005, thereby leaving approximately 60 days in the period of limitation until February 20, 2006, which marked the end of the two-year statute of limitations for medical malpractice.

After the waiting period had run, plaintiff filed her initial complaint and affidavit of merit on June 16, 2006. At the time of filing and serving the complaint and affidavit of merit, the statute of limitations was once again tolled with approximately 60 days remaining in the statute of limitations as to the initially named defendants. *Scarsella, supra,* 550.

On July 19, 2006, defendant Dr. Frederick Lewerenz filed a notice of non-party fault. When a defendant files a notice of nonparty at fault, plaintiff is then given 91 days to file a claim against the new party even if the statute of limitations would have otherwise run, as long as the new cause of action would not have been barred by a period of limitation at the time the original cause of action was filed. MCR 2.112(K);[2] MCL 600.2957(2).[3]

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[2] The court rule provides:

> (4) Amendment Adding Party. A party served with a notice under this subrule may file an amended pleading stating a claim or claims against the nonparty within 91 days of service of the first notice identifying that nonparty. The court may permit later amendment as provided in MCR 2.118. [MCR 2.112(K)(4).]

[3] The statute provides:

> Upon motion of a party within 91 days after identification of a nonparty, the court shall grant leave to the moving party to file and serve an amended pleading alleging 1 or more causes of action against that nonparty. A cause of action added under this subsection is not barred by a period of limitation unless the cause of action would have been barred by a period of limitation at the time of the filing of the original action. [MCL 600.2957(2).]

MCR 2.118(D) provides that "an amendment that adds a claim or a defense relates back to the date of the original pleading if the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth, or attempted to be set forth, in the original pleading." But the doctrine of relation-back does not apply to the addition of new parties. *Miller v Chapman Contracting*, 477 Mich 102, 106; 730 NW2d 462 (2007). Therefore, when calculating the date that the amended complaint was filed against defendants, the doctrine of relation-back does not apply and the date it was actually filed, October 6, 2006, is the applicable date.

A saving statute is a statutory provision that allows a claimant to file suit even after the period of limitations has expired. *Vanslembrouck v Halperin*, 277 Mich App 558, 573; 747 NW2d 311 (2008). That is in contrast to a statute of limitations that is a statutory provision requiring "a person who has a cause of action to bring suit within a specified time." *Id.* Because the specific language of MCL 600.2957(2) allows a claimant to file suit after a period of limitations has expired, it is a saving statute rather than a statute of limitation. Savings statutes are not tolled by statutory provisions that toll statutes of limitation and statutes of repose. *Waltz v Wyse*, 469 Mich 642, 649-650; 677 NW2d 813 (2004).

Plaintiff relied on the 91-day savings provision to add the nonparties because the statute of limitations ran before the complaint was filed and served on defendants. Plaintiff did not file or serve an amended affidavit of merit relating to the care provided by defendants. Accordingly, there was no tolling of the statute of limitations as to these defendants, and merely filing a complaint within the 91-day savings provision without filing an applicable affidavit of merit is insufficient to commence an action for medical malpractice. *Scarsella, supra,* 449. Summary disposition is proper under MCR 2.116(C)(7) because the statute of limitations has expired and there has been no affidavit of merit filed concerning defendants.

Reversed and remanded to the trial court with directions to enter an order granting summary disposition to defendants and dismissing plaintiff's case against them with prejudice because the statute of limitations has expired. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Brian K. Zahra
/s/ Donald S. Owens